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CORRESPONDENCE

BETWEEN HER MAJESTY'S

Principal Secretary of State for the Colonies

AND THE

EARL OF DURHAM,

ON THE

SUBJECT OF THE LATTER'S RESIGNATION

OF THE

**OFFICES OF GOVERNOR GENERAL OF BRITISH NORTH
AMERICA, AND HIGH COMMISSIONER IN THE
CANADIAN PROVINCES.**

TRANSMITTED TO SIR GEORGE ARTHUR.

BY ORDER OF THE HOUSE OF ASSEMBLY,

Toronto:

W. J. COATES, *Printer.*

GEORGE

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25th, 26th
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His Exc
SIR

GEORGE ARTHUR.

The Lieutenant-Governor transmits to the House of Assembly, in compliance with the request contained in their Address of the 6th instant, copies of a correspondence between Her Majesty's Principal Secretary of State for the Colonies and the Earl of Durham, relating to His Lordship's resignation of the Offices of Governor-General of Her Majesty's Colonies in North America, and of High Commissioner within the Provinces of Upper and Lower Canada.

For the further information of the House of Assembly on so important a subject, the Lieutenant-Governor has also deemed it proper to annex to the copies of that correspondence the copy of a Despatch to himself from the Secretary of State for the Colonies, enclosing copies of the answers which had been returned by Lord Glenelg to the Earl of Durham's Despatches to His Lordship, Nos. 66, 67, and 68, of the 25th, 26th, and 28th of September last, together with the copy of a Despatch addressed by Lord Glenelg to the Earl of Durham on the 15th of December following, in reference to His Lordship's Proclamation of the 9th of the preceding month of October.

*Government House,
14th March, 1839.*

(Copy.) No. 13.

*Castle of St. Lewis,
Quebec, Oct. 9th, 1838.*

SIR,

I have the honor to transmit to Your Excellency a copy of a correspondence between Her Majesty's Principal Secretary of State for the Colonies and myself, on the proceedings which have taken place in the House of Lords, relative to the Ordinance passed by me and the special Council on the 28th of June.

I have the honor to be,
&c. &c. &c.

(Signed,) DURHAM.

*His Excellency Major-General
SIR GEORGE ARTHUR,
&c. &c. &c.*

(Copy.) No. 83.

*Downing Street,
5th August, 1838.*

MY LORD,

Despatch from Colo. nial Secretary on the patch of the 29th June, No. 18, reporting the pro-
subject of the dispo- ceedings which you had adopted for disposing of the
sal of certain persons Prisoners whom, on your arrival in Canada, you found
charged with High in confinement on charges connected with the late
Treason. insurrection.

Measures of the High
Commissioner ap-
proved of.

Submitted, neverthe-
less to the Law Offi-
cers of the Crown.

Her Majesty's Government are fully alive to the difficulties by which this question was surrounded.— It has, therefore, afforded them much satisfaction that you have been able to surmount those difficulties, and that the course which you have adopted has been favorably received in the Province, as equally free from the imputation of too great severity, or of excessive and ill-considered lenity.

While, however, I convey to you the approbation of Her Majesty's Government of the spirit in which your measures have been conceived, I abstain from making any observations on the legal objections which may possibly occur to some of the provisions of the Ordinance, a copy of which is transmitted in your despatch, as it is at present in the consideration of the Law Officers of the Crown.

I have the honor to be,
&c. &c.

(Signed,) GLENELG.

To the Right Honorable
THE EARL OF DURHAM,
&c. &c. &c.

(Copy.) No. 84.

*Downing Street,
6th August, 1838.*

MY LORD,

Despatch approving of the appointment of a Commission to en-
quire into the best mode of disposing of the waste lands of the Crown Lands, the Crown in the British North American Colonies. with a view to the promotion of Emi-
gration.

I have had the honor to receive Your Lordship's despatch of the 29th June, No. 19, enclosing a copy of a Commission which you had issued for an inquiry into the best mode of disposing of the waste lands of the Crown in the British North American Colonies. Her Majesty's Government entirely approve of this measure, and of the instructions respecting it, which you addressed to the several Lieutenant-Governors of the neighboring Colonies. They are fully aware of the great importance of establishing a general and

efficient system of disposing of the Crown Lands as connected with the question of promoting emigration from the Mother Country to those Colonies, and they anticipate the most beneficial results from the establishment of such a system.

I have the honor to be,

&c. &c. &c.

(Signed,) GLENELG.

*To the Right Honorable
THE EARL OF DURHAM,
&c. &c. &c.*

(Copy) No. 66.

—•—
*Castle of St. Lewis,
Quebec, Sept. 25th, 1838.*

MY LORD,

Previous communications from me will have injurious effects of made your Lordship aware of the very injurious effects the discussions in the upon the course of my Government occasioned more ^{House of Lords,} of or less by all the proceedings, with respect to my ^{the mission of the} Lord High Commis. Mission, which have taken place in the House of sioner.

Lords since my departure from England. The representations which I have made to you upon this subject, were but the echo of the public voice in these

Colonies, where all men, of whatever class or party, were agreed in thinking, that unless I should be cor- ^{Support of the Home} dinally supported by the Legislature which had created ^{Government and} Legislature essential most extraordinary powers of Government for this ^{to the success of that} country, and by the Ministers of the Crown who had

placed that extreme authority in my hands, there was not the slightest prospect of any satisfactory result.

The proceedings in the House of Lords, from the moment of my leaving the shores of England, shewed ^{This support not ex-} but too distinctly, that the support so essential to my ^{tended to Earl Dur-} ham.

success was not extended to me. I allude in particu- ^{Duke of Wellington's} lar to the speech of the Duke of Wellington on the ^{Speech in House of} 4th July, and to the expressive silence of the Prime ^{Lords proves this.} Minister on that occasion.—His Grace was pleased

to say—"The act gives no power further than that of making certain Reports on an important subject respecting the Government of Canada, and of directing the formation of a commission of enquiry for that purpose; in any other respect, so far as my recollection serves me, I know of no other powers given to the Earl of Durham which are not ordinarily given to every Governor of a Colony." The tacit assent of Her Majesty's Ministers, was even more injurious

As also the course than Lord Melbourne's previous expression of "very pursued by Her Ma- great concern and surprise" at one of my appointments. In the latter case my authority was not seriously affected, because it depended on myself to persevere in an appointment, which had been originally suggested to me by a member of the Government. I

Remarks on Mr. Turton's appointment. had constantly refused Mr. Turton's repeated proffers of resignation. His talents and uncommon assiduity had been appreciated here. The proceedings of the opposition and of the Government with respect to him were attributed to the impatience of the one, and the timidity of the other, of the two great parties which divide the House of Lords. And the performance of the arduous duties imposed upon me was scarcely impeded here by what had occurred. It was not impeded, let me repeat, because in that case I was enabled to maintain a deliberate act of my Government, and to preserve my honor as a gentleman, by declining all participation in the sacrifice of one, whose ruin through his connexion with me, would, if I had taken any share it, have left a foul stain on my character.

High Commissioner's authority seriously weakened by the conduct of both parties in the House of Lords. But in the other case, when the leaders of these two great parties, the one by the most unqualified expressions, and the other by consenting silence, concurred in depreciating the authority with which I had been invested, that authority was seriously weakened.

Effects produced thereby upon the public mind. The effect upon the public mind was instantaneous and most remarkable. The disaffected (and how numerous these are your Lordship will have learned from my Despatch of the 9th August, No. 36 marked "secret and confidential,") were encouraged to believe, that as my authority was so questioned, the manner in which it had been, or might be exercised, would to a certainty be vigorously assailed by the Opposition and feebly defended by the Government.

The disaffected encouraged to show signs of still greater disaffection, requiring the utmost vigilance on the part of the Government. And they inferred that the success of my mission, which, as all parties at home had allowed when the danger was imminent, and all here still felt, vigilance on the part depended on the vigorous exercise of an extraordinary authority, was thus rendered next to impossible. In forty-eight hours after the speech attributed to the Duke of Wellington had been published here, the tone of that part of the press, which represents the disaffected, exhibited a remarkable change; giving evidence, no longer of submission, however unwilling, to extraordinary powers unhesitatingly exercised, but of discontent, irritation, and seditious hopes. From

that time forth too, down to this day, I have continually received intimations of a state of feeling amongst the Canadian peasantry of the District of Montreal, which threatens,—if not actual, disturbances during the winter,—still so much combination of purpose and means amongst the disaffected, as to require the ^{The same means pro-} utmost vigilance on the part of Government. Nor ^{duced an opposite} did the Duke of Wellington's speech and Lord Mel- ^{effect on the Loyal} bourne's silence on that occasion, produce a less mis- ^{inhabitants of the} Colony. ^{chievous effect upon the great bulk of the British race} in this Colony. As respects this class, the first impression created by this evidence of my being left without adequate support at home was one of despondency. I can speak almost from my own personal knowledge of numbers including gentlemen of the most respectable character and highest influence, who had entered into all my views for the improvement of this much neglected Country, who were aware of my determination, so far as it might depend upon me, to remove the ^{Despondency and irritation of this part of the population.} causes—to dry up the very source of past dissensions, and to render this Colony essentially *British* in its laws, Institutions, and character; who had merely on account of those views and intentions, afforded me their confiding support; and who were employing their valuable influence in diverting Public attention from the miserable past, and endeavouring to fix it on a happy prospect of peace and prosperity. These Gentlemen, when the news in question arrived from England,—when they perceived that I was left alone to struggle with unparalleled difficulties,—could no longer rely on the accomplishment of any of the important measures that I had projected. They were therefore led, most naturally, as it appears to me, instead of looking with confidence to the future, first to despair of any fruit from my exertions, and next to recur to the past with feelings of irritation as violent as were ever produced amongst the British race in this Colony by the worst previous sacrifice of Colonial interests to the object of mere party in the Mother Country. Such is the unanimity of opinion and feeling amongst the British population of this Colony, that the individuals whom I have described, fairly represent the whole class. The despondency and irritation of that Class were as conspicuous as the half elated and threatening activity of the disaffected portion of French Canadians. But such was the effect produced upon both Classes, that is, upon the great bulk of the people, by the party proceedings at Home.

^{These effects produc-}
^{ed entirely by the}
^{party proceedings in}
^{England.}

His Lordship much discouraged by the conduct of the Opposition at home and the acquiescence of informed of its progress: and I must not conceal from Her Majesty's Ministers therein.

Although I happened to be suffering from severe illness during the period in which this change of opinion was in course of taking place, I was constantly informed of its progress: and I must not conceal from Your Lordship that this information had a most discouraging effect upon myself. It soon became plain to me that the great difficulties necessarily attendant on my position, were fearfully increased by the assaults made upon my Government by the opposition at home, and tacitly (when not even in a

His Lordship relied still more injurious mode) suffered by Her Majesty's Ministers. Upon two things alone could I chiefly rely for success. First, the great extent of the legal powers conferred upon me, enhanced as they had been morally by the universal exertion of the people at pressur in England of satisfaction at my having undertaken to exercise them. The second was the general opinion which prevailed throughout these Colonies, here that I might reckon with perfect confidence on the most powerfully undeviating approval and support of the Members of supported by the Ministry at home. Her Majesty's Government, with most of whom I had

been so long and intimately connected, as well by

But His Lordship is personal friendship as by political relations. By the disappointed and de proceedings in question, I was deprived of these, the prived of those only but all sufficient grounds of confidence in my grounds of confidence in his own exertions.

people of these Colonies are not better acquainted with the springs and influences of party politics in England, than are most English politicians with the real state of parties and of Public affairs on this distant part of the world. You will easily understand, state of the case, be. therefore that no sufficient allowance was made here lieved His Lordship's for the nature of those party motives which had dic- authority to be very limited, & the bright prospects held out by verment in respect to my mission. It was supposed him to be a mere that the great party in opposition at Home really delusion.

believed my authority to be no more extensive than that of an ordinary Governor in ordinary times: That Her Majesty's Ministers were of a similar opinion; that all my promises of unusual measures suited to the unusual circumstances of the case had been made inadvertently or delusively; and that I had no more prospect of healing the wounds inflicted on this country by a long course of shifting and temporising policy, than if the Act for suspending a constitution and conferring Legislative powers on an individual had never passed. In fact whatever may be the

power moral I may great a Her M ever. tempte have b which howeve the con which Colonie liament the use relying Legisla Enterp above consequed it n the peo fided in so long. Thus in tion, an in bring by which establish loyal pe gaged No. 83 express including Prisone

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powers, which that Act legally confers upon me, the moral authority of my Government,—the *prestige*, if I may so speak, of power once imagined to be so great and of a supposed unbounded influence with Her Majesty's Government, was gone apparently for ever. Under these circumstances I was greatly tempted to resign my authority, which appeared to have become inadequate to the grave emergency which alone had called for its existence. I did not, however, give way to this sentiment of despair. On the contrary making all allowance for party motives, which could not be appreciated by the people of these Colonies; trusting that the approaching recess of Parliament would soon leave me undisturbed to pursue the useful course, on which I had already determined; relying not a little on the early promulgation here of Legislative measures calculated to encourage British Enterprise and promote general prosperity; and above all influenced by a conviction that the worst consequences might result from my resignation, I deemed it my duty to the Queen, to my Country, and to the people of these Colonies, who had generously confided in my good intentions, to persevere in my course so long as there was the least chance of success.— Thus impelled, I banished every thought of resignation, and occupied myself more diligently than ever in bringing to maturity the whole series of measures by which I have hoped that these Colonies might be established in peace and prosperity as a happy and loyal portion of the British Empire. I was thus engaged when I received your Lordship's Despatches, Despatches were received conveying the expressions of the satisfaction which all my measures, including the Proclamation relating to the Political prisoners, had given to Her Majesty's Government.

Those Despatches were the more gratifying inasmuch as they were accompanied by numerous unofficial letters from members of the Government, and especially by those from yourself and Lord Melbourne, whereby the expressions of official approbation were most warmly and kindly confirmed.

While these Despatches and Letters were still before me, an American newspaper, which had reached Quebec by the same conveyance was placed in my hands. Your Lordship will judge of my astonishment when I inform you, that it contained a Report of the

Flattering letters from Members of Her Majesty's Government were received at the same time.

proceedings in the House of Lords on the 7th, 9th and 10th of August.

At present no other information on the subject has reached me.

I shall abstain until officially informed, from entering at length on that important subject. Meanwhile, however, it behoves me to assure Your Lordship that public opinion here does not wait for the receipt of official intelligence on matters of vital moment to the interests of all; and that it has been most deeply affected by the sufficiently authentic intelligence.

Thus situated His Lordship has no alter-^a a future Despatch,) but to declare whether or not I native but to quit ^a should resign my now useless office. As Your Lord-
post rendered unten-^a ship will perceive by the Documents which I have able by those from whom he expected the honor to enclose, (being an address to myself from every support and as-^a the Delegates of the Colonies of Nova Scotia, New assistance.

Brunswick and Prince Edwards Island, with my answer) I have resolved on resigning an authority which has now, indeed, become thoroughly inadequate to the ends for which it was created, and on quitting a post which has been rendered altogether untenable by those, from whom I expected every possible assistance in maintaining it.

On the receipt of offi-^a I shall not lose a moment after hearing officially of cial intelligence, His the recent proceedings in England, in fully explaining Lordship will decide to Your Lordship the reasons for my having arrived upon the time for so^a at this determination, and the grounds on which I may, doing. after ample deliberation, decide upon the time for carrying it into effect.

I have, &c.

(Signed.)

DURHAM.

*To the Right Honourable
THE LORD GLENELG.*

(Copy)

*To His Excellency the Right Honorable John George
Earl of Durham, &c. &c. &c.*

Address of Depr. a. In approaching Your Lordship on the eve of our tions from Nova Sco. departure from Quebec, we beg unanimously to offer tia, New Brunswick, and Prince Edward Island, expressing their high sense of heard of Your Lordship's rumoured intention to resign His Lordship's short the Government of these Provinces.

The duties of the mission with which we have been intrusted by the Lieutenant Governors of Nova Scotia, New Brunswick and Prince Edward Island, and the frankness of communication permitted by Your Lordship; have brought us into acquaintance with Your Lordship's feelings and views in relation to British North America, and irresistibly impressed on our minds the conviction, that Your Lordship cherished an ardent desire to elevate the Colonies committed to your Government, and entertains conceptions calculated to render that desire effective.

In a review of the short period of the Government under Your Lordship's personal direction, we behold Your Lordship, with that feeling so congenial to Englishmen, which turns with repugnance from the shedding of Blood on the scaffold, blending mercy with justice; while returning tranquillity had already rewarded an administration conducted without the sacrifice of one human life; and we were aware that improved laws and constitutions were in preparation, which, under a Government form, mild and impartial, gave to the future the reasonable prospect of restored confidence and renovated prosperity.

For the Provinces with which we are more personally connected, we saw, in the warm interests, the enlightened and comprehensive views, and extensive powers, of Your Lordship, the dawning of vigor and improvement hitherto unknown. With Your Lordship's departure those anticipations will we fear, fade away; but, although it should be our lot to see these Provinces continue feeble and nerveless, compared with the condition at which their natural advantages entitle them to aim, yet shall we ever remember with gratitude the statesman who, exalted in the first rank, and treading on the highest eminences of political life in our common country, hesitated not, at the call of his Sovereign, with disinterested zeal, to undertake an office of unparallel'd difficulty, and has given to these distant territories the benefit of his enlarged experience and vigorous conceptions. Your Lordship's comprehensive mind has opened to our view the animating prospect of great public improvements advancing our common welfare, and which will ever associate Your Lordship's name with the highest prosperity of the Colonies.

We are unwilling to abandon the hope, that Your Lordship may yet continue in the administration of

your high office. Under any circumstances, we beg to assure Your Lordship that our most ardent wishes for the happiness of the Countess of Durham, Your Lordship and family, will accompany you through life.

Deputation from No-
va Scotia.

(Signed.)

J. W. JOHNSTON, Member of the Legislative Council of Nova Scotia.

JAMES B. UNIACKE, Member for the County of Cape Breton, and Member of Council.

WILLIAM YOUNG, Member of Assembly for the County of Inverness.

M. B. ALMON.

Deputation from Nova Scotia.

Deputation from
New Brunswick.

CHARLES SIMMONS, Member of the Executive Council and Speaker of the Assembly for New Brunswick.

HENRY PETERS, Legislative Council.

E. BOTSFORD, Member of Executive and Legislative Councils.

HUGH JOHNSTON, Member of Executive Council and House of Assembly.

JAMES KIRK.

JOHN ROBERTSON.

Deputation from New Brunswick.

Deputation from
Prince Edward Is-
land.

J. H. HAVILAND, Member of Executive and Legislative Councils.

GEORGE DALRYMPLE, Speaker of the House of Assembly.

JOSEPH POPE, Member of Assembly for Prince County.

Deputation from Prince Edward Island.

Quebec, 22d Sept. 1838.

(Copy)

**Answer of Earl Dur-
ham to the preceding
Address.** It is impossible for me to express to you in language sufficiently strong, the feelings of gratitude and pleasure with which I have received this address.

Representing as you do, so worthily, the Three Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, this proof of your confidence in me, and approbation of the principles on which my

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administration has been conducted, is most gratifying to me.

I assume the Government of the North American Provinces, with the pre-determination to provide for the future welfare and prosperity of them all; never doubting that such a provision would be the best, nay the only real security for their permanent connection with the British Crown. In communications which have taken place between us, and from which I have derived equal pleasure and information, you have been fully apprised of my views and intentions. These you have appreciated and recognised in a manner for which I can never be sufficiently grateful. I have, indeed, had a difficult and laborious duty to perform. The result of my endeavours, however, is one of which I need not be ashamed. In the short space of little more than three months, I have seen tranquillity restored and confidence reviving. I have caused substantial justice to be administered, tempered by mercy. I have carefully examined, with a view to reformation, all the Institutions of the Province more immediately committed to my charge; and I was on the point of promulgating such Laws as would have afforded protection to all those British Interests which had been too long neglected. I had also as you well know, devoted the most careful attention to all subjects which could affect the general interests of all the Colonies, and had brought nearly to maturity the plan which I intended to submit in the first instance, to the consideration of the Provinces, and eventually of the Cabinet and the Imperial Parliament. In this I trust useful course, I have been suddenly arrested by the interference of the British Legislature; in which the responsible advisers of the Crown have deemed it their duty to acquiesce. Under these circumstances, I have but one step to take—to resign that authority—the exercise of which has thus been so weakened as to render it totally inadequate to the grave emergency which alone called for its existence.

Answer of Earl Dur-
ham to Address of
Deputation from No-
va Scotia, New
Brunswick, & Prince
Edward Island.

Be assured however, of this Gentlemen, that this unexpected and abrupt termination of the official connection which united me with the North American Provinces, will not weaken in my mind the feelings of deep interest which I shall ever take in their fate, or render me less anxious to devote every faculty of my mind, every influence I may possess, to the advancement of their interests, and to the establishment, on

the most lasting foundation, of their welfare and prosperity.

—~~Geo~~—

Downing Street,
15th August, 1838.

(Copy.) No. 89.

MY LORD,

Despatch from Lord Glenelg to the Earl of Durham, respecting the prisoners sent to Bermuda; and stating various opinions on the subject.

With reference to my Despatch, No. 83, of the 5th inst., I have now the honor to enclose to you a copy of the Report of the Law Officers of the Crown on the Ordinance providing for the security of the Province of Lower Canada, a copy of which was transmitted in your Despatch of 29th June, No. 18.

Crown Officers' opinion.

Your Lordship will observe that the Attorney and Solicitor General are clearly of opinion that so much of the Ordinance as relates to the restrictions to be placed in Bermuda on the eight persons sent by you to that place, is void, inasmuch as the legislative jurisdiction of the Governor and Special Council of Lower Canada does not extend beyond the limits of the Province. In all other respects they are of opinion that the provisions of the Ordinance were within the competency of the Governor and Special Council.

I regret, however, to state, that a different view of the case was taken by several individuals of high legal attainments, whose station and professional experience could not fail to secure great weight to their opinion in the House of Lords, where the question was first agitated. There were indeed some, who went so far as to contend that the whole ordinance was illegal, as exceeding the Legislative authority vested by Parliament in the Special Council; but as this view of the case has not received the sanction of either House of Parliament, Her Majesty's Government, in accordance with the opinion of the Law Officers of the Crown, are fully satisfied that the powers confided by Parliament to the Governor and Special Council are sufficiently ample to authorise them to Legislate to the full extent of the Ordinance in question, so far as it relates exclusively to acts to be done within the Province of Lower Canada. But an objection of a more popular and general nature was also urged with great force against so much of the ordinance as purports, on a conviction for returning to the Province without permission, to subject to capital punishment those persons who, having fled the Province, had thereby

Different view of the subject in the House of Lords.

avoided the execution against them of the warrant for their apprehension on the charge of High Treason.

Her Majesty's Government, fully sensible of the numerous and weighty difficulties with which you had to deal, with reference to this question, of the notoriety of the conduct of those persons who, having taken an open part in inciting their followers to insurrection, had fled to the United States, in order to withdraw themselves from justice, and of the importance of securing the Province for a time at least against their return—and aware moreover that ample time had been afforded to these parties, had they been so disposed, to surrender themselves to Justice, and demand their trial, would have been quite satisfied to have left in your Lordship's hands the mode of dealing with them, with perfect confidence that no act of needless severity or of substantial injustice, would have either been committed or sanctioned by your authority. The course however which Her Majesty's Government would have taken, as in their judgment the best calculated to uphold your authority, and thereby to consult the success of your mission, has unhappily, as they feel, been overruled. A Bill was introduced into the House of Lords, the object of which, as it was originally submitted, was two-fold. First, to obtain a declaration of the intention of Parliament in accordance with the view to which I have referred, of the narrow and restricted extent of the Legislative powers of the Special Council, and thereby not only to invalidate the ordinance as altogether illegal, but also to prevent any future Legislation by the same authority, involving a departure from the ordinary course of Criminal Law, under whatever circumstances of danger and emergency ;—and Secondly, to provide an indemnity in respect of all acts done in pursuance of the Ordinance. Her Majesty's Government felt it their duty to offer a decided opposition to the second reading of that Bill in the House of Lords, as calculated in their opinion most injuriously, and contrary to the spirit and tenor of the act for making temporary provision for the Government of Lower Canada, to narrow and restrict the power vested by Parliament in the Special Council. I regret, however, to state that the second reading of that Bill was carried in the House of Lords. Under these circumstances, and after the public discussions which had taken place on the subject, Her Majesty's Government, compelled as they were to

Bill introduced in the House of Lords to nullify the Ordinance of Earl Durham and Council.

Her Majesty's Government oppose the second reading of the Bill.

Second reading carried.

Ministers advise Her Majesty to disallow the Ordinance.

Amendments made in Committee.

Bill passed.

Course recommended by Her Majesty's Government for the future.

admit that a portion of the Ordinance, though comparatively unimportant, rested on no legal foundation, most reluctantly advised Her Majesty to disallow the Ordinance. Extensive amendments were subsequently made in the committee on the Bill, The clause which would have restricted the Legislative powers of the Special Council was altogether omitted, and the indemnity was expressly confined to Acts done in respect of that part of the ordinance which was admitted to be beyond the Legislative authority of the Governor and Special Council. The Bill so amended, has been since passed by the other House of Parliament, and has received Her Majesty's assent. I send you a copy of it. The comparatively unimportant point, to which alone the act, as it has finally passed, applies, renders it in itself a measure demanding but a slight and passing notice.

Her Majesty's Government cannot however conceal their apprehension, that the discussions which have been raised on this question, may tend to impede and embarrass your course in the settlement of the affairs of Canada, and to raise anew some of those difficulties and obstacles, which under your administration, appears to be rapidly on the decline. But on the other hand, the opposition to your measures in this country has given rise to such strong expressions of confidence in the purity and excellence of the motives by which your conduct has been regulated, and has drawn forth from those personally interested in the affairs of Canada, such decided testimony to the beneficial tendency of your administration, that Her Majesty's Government cannot but hope that your hands may be rather strengthened than weakened by the degree of public attention which has been directed to this subject. At the same time they feel it their duty to leave you in no uncertainty as to their views on the course which it may be expedient now to adopt with regard to the persons who in consequence of the disallowance of the ordinance can no longer be liable to its provisions. In the first place, I have to convey to you Her Majesty's entire approbation of the Proclamation issued by you, on the 28th of June, by which, with the exception of the 23 persons specifically referred to, an amnesty was granted to all other persons charged with treasonable offences committed during the late disturbances and Insurrection in Lower Canada. In order however to maintain the distinction

which you appear so properly to have made between the chief leaders and instigators of the Insurrection, and their misguided followers, Her Majesty's Government are decidedly of opinion that, notwithstanding the failure of the provisions of the Ordinance, the eight persons sent to Bermuda not to be allowed to return to Lower Canada, should not be permitted to return to Lower Canada, except by the express permission of Her Majesty, or of Her Representative in the Province.

It seems to them that this object could be best attained by an Ordinance, to be passed by yourself and the Special Council, subjecting the persons in question to such penalty, short of death, as may be thought expedient, in the event of their being convicted of returning to the Province without such permission.

With regard to those who had previously fled from Public notice should be given to those persons. justice, it may, perhaps, be sufficient, by Proclamation or by any other clear and unambiguous channel of information, to make it publicly known that, should they re-enter the Province, without the same permission, they will forthwith be arrested and dealt with, according to Law, on the charge of Treason. It will at the same time, be desirable to continue or renew Habeas Corpus Act the suspension of the Habeas Corpus, that you may be should be suspended. able to detain any of them in custody in the event of their arrest, should the safety of the Province render such a proceeding necessary. In adopting this plan, it will be indispensable that the Suspension Act should be passed at the same time as the Proclamation is issued, and made as publicly known as the Proclamation, in order to avoid the possibility of any of the parties, referred to in the Proclamation, entering the Province in ignorance of the Suspension Act. To let them enter in such ignorance, would be to deal unfairly with them. Her Majesty's Government hope that, by this means, the end which you had in view, may be attained, of averting the serious evil to be apprehended from persons being at large within the Province who had notoriously taken a prominent part in the recent revolt, and whose presence could not fail to occasion jealousy and dissatisfaction among the subjects of Her Majesty, and might tend to re-awaken feelings and passions which it must be the anxious desire of the Government to suppress and to allay. I do not intend to prescribe to you the precise course, to which I have adverted, as that which, under existing circumstances, ought to be adopted, nor am I in-

sensible to the objections to which any course on this subject is liable from those who are disposed to take an unfavorable view of the conduct of the Government; but I am anxious to relieve you, as far as possible, from the uncertainty in which you might be involved by the recent debates in Parliament, as to the extent to which you would be held justified in proceeding with respect to the small number of persons whom, in the exercise of a sound and wise discretion, you have excepted from the amnesty which has been extended to the great body of persons implicated in the Insurrection.

I have assumed throughout the consideration of this question that no steps have been taken under the Ordinance passed by the Special Council, during Sir John Colborne's Administration, "for the more speedy attainder of persons indicted for High Treason, who have fled from the Province or remain concealed therein to escape from Justice."

It will be for your Lordship to determine, whether it would be advisable to proceed against the parties to whom that Ordinance refers in the manner there prescribed; but, as the object to be attained is not so much the severe punishment of the guilty as their exclusion from the Province, and the suggestion to them of some motive for abstaining, during such exclusion, from a mischievous interference with its affairs, the other course to which I have referred appears to Her Majesty's Government to be, under the peculiar circumstances of the case, the most expedient.

Her Majesty's Government feel great regret at the embarrassment to which his Lordship has been subjected on this subject.

I cannot conclude this Despatch without expressing the deep regret which Her Majesty's Government have felt at the embarrassment to which you will have been subjected, by the recent proceedings in Parliament, regarding the difficult and delicate question of the disposal of the persons charged with Treason in Lower Canada. On a deliberate review of the whole case, Her Majesty's Government are enabled distinctly to repeat their approbation of the spirit in which those measures were conceived, and to state their conviction that those measures have been dictated by a judicious and enlightened humanity, and were calculated under your authority to satisfy the ends of justice, although in some respects they involve a departure from its ordinary forms. The Government are also persuaded that your Lordship will be equally anxious with themselves to avoid, as far as possible,

giving even a plausible ground of cavil or objection to hostile criticism.

It only remains for me to assure you of the undi-
minished confidence which Her Majesty's Government support of Her Ma-
jesty's Government
repose in you ; and of their earnest desire to afford ^{assured to His Lord-}
you the utmost support in the discharge of the ardu-
ous duties with which you are entrusted.

I have, &c.

(Signed,) GLENELG.

The Right Honorable
THE EARL OF DURHAM,
&c. &c. &c.

(Copy.)

Temple, August 6th, 1838.

MY LORD,

In answer to your Lordship's letter of the 4th instant, requesting our opinion whether there is any objection in point of law to the confirmation, by Her Majesty in Council, of an Ordinance passed by the Earl of Durham and the Special Council of Lower Canada, on the 28th June last entitled, "An Ordinance to provide for the security of the Province of Lower Canada." We have to state, that in our opinion so much of this Ordinance as directs the class of persons therein first enumerated to be transported to Bermuda and to be kept under restraint there, is beyond the power of the Governor and Special Council and void; but that all the rest of the Ordinance is within their power and valid.

The Imperial Statute 1st Vic. chap. 9, Sec. 2, authorises the Governor and Special Council to make such Laws or Ordinances for the peace welfare and good Government of the Province of Lower Canada, as the Legislature of Lower Canada, as then constituted, was empowered to make, with certain exceptions which do not affect the validity of the Ordinance in question. The Legislature of Lower Canada, as constituted by 31st Geo. III. chap. 81, had conferred upon it a general Sovereign Legislative power within the Province, and it is expressly enacted, that all acts passed by this Legislature shall be valid and binding to all intents and purposes within the Province in which the same shall have passed.

We conceive therefore that the old Legislature might have lawfully passed an Act for banishing from

the Province the first class of persons described in this ordinance, and enacting that if any of this class or of the second class should return to the Province without the leave of the Governor, they should be deemed guilty of Treason, and being convicted thereof should suffer death. This could not be done by the Proclamation of the Governor, but it is an Act of Legislation for which there are precedents in the Parliaments of Great Britain and of Ireland. There is no pretence ~~for~~ ^{of} saying that if this part of the ordinance really were put in force, that the parties who suffer would be put to death without trial. Before they suffer they must be indicted for having returned to the Province without leave of the Governor, which by Law is made Treason, and they could only suffer on being duly convicted of the offence laid to their charge. Of course we are only considering the regularity of such a proceeding without giving any opinion as to its being expedient or proper.

With respect to that part of the ordinance which is to be executed beyond the limits of the Province of Lower Canada, we are of a opinion that it would acquire no force by being confirmed by Her Majesty.

We have the honor to be

&c.

(Signed,) ^{*}

J. CAMPBELL.

"

R. M. ROLFE.

THE LORD GLENELG.

&c. &c. &c.

—••—

(Copy)

Castle of St. Lewis,
September 26th 1838.

MY LORD,

Despatch from the
Earl of Durham to
Earl Glenelg.

The legality of the
Ordinance maintain-
ed by His Lordship.

The late debate in the House of Lords, and the observations that have been made there upon the Ordinance passed by the Special Council of this Province subjecting the State Prisoners to transportation to Bermuda, imperatively call on me to submit to you a statement of my views upon the legality of that Ordinance, and of the grounds upon which with every deference to the House of Peers, and the high legal authorities who are asserted to have declared its illegality, I venture to maintain that no part of that Ordinance is in itself illegal, however inoperative it might, and must of necessity be, without the assist-

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ance and co-operation of the Home Government, and the British Parliament, or the Legislature of the Bermudas under sanction of Her Majesty's Ministers.

The Imperial Statute 5th Geo. IV. ch. 84, Sec. 3, *Provisions of Imprisonment for Felons and other Offenders*, provides that His Majesty in Privy Council may appoint any place beyond the Seas, either within or without his Dominions to which Felons and other offenders under Sentence or *Order of Transportation or Banishment* shall be conveyed. It provides for the imprisonment of such Offenders, their conveyance either in contract Vessels or in Her Majesty's Ships, their punishment for misconduct on the voyage, their delivery to the Governor of the Colony to which they may be sent, and their safe custody after arrival.

Section 17, recites that by Law, in some of the Colonies, offenders convicted of certain offences are liable to be transported beyond the seas, and that there might be no means of transporting such convicts to any of the places appointed by "His" Majesty in that behalf without bringing them to England, and it then provides that such convicts when brought to England may be imprisoned in any place of confinement under that Act, and *so soon as he shall be so imprisoned* all the provisions of that Act shall be applicable to every such convict as if convicted and sentenced in England. No provision is by this Act made for their treatment up to their being brought to England. That is left to the local Legislatures.

The Imperial Statute, 6th Geo. IV. chap. 89. Sec. 4, provides that "His Majesty" by an Order in Council, may authorise the Governors, &c. for the time being of any of the Colonies to appoint the place within "His" Majesty's Dominions to which offenders convicted in any such Colony and being under sentence or order of transportation shall be sent or transported, and provides that such convicts at the place to which they may be transported shall be subject to the same laws as other convicts, but it makes no provision for their transport, or their treatment on the voyage to England; that is still left to the Local Legislatures, at least there is no other mode of providing for it.

Under these Acts an order of Council was issued on the 11th November, 1825, directing that all Governors of the Colonies for the time being, should from time to time appoint the places to which convicted offenders should be transported.

Order of Council of 11th Nov. 1825 issued

Other authorities
quoted.
6th Wm. 4, c. 1, con-
tinued by Ordinance
of 1st Vict. c. 8.

Lord Gosford, on the 7th October, 1835, issued his Proclamation appointing such convicts to be sent to England, and from thence to New South Wales, and Van Diemen's. The Provincial Legislature, by Act sixth William the Fourth, ch. 1, continued by the Ordinance of the 1st Vict. chap. 8, provided that—“ Whenevr any offender shall have been lawfully sentenced by any of His Majesty's Courts in this Province, other than Courts Martial, to transportation, it shall be lawful for the Governor for the time being, from time to time, to cause any such convict to be removed from *any place of confinement in this Province to any other safe place of custody.*” (It does not repeat “in this Province,”) “ and thence to be sent to England, to be there imprisoned according to the provisions of the fifth George the fourth, ch. 84, Section 17, to be thereafter transported to New South Wales, or Van Diemen's Land.”

The Act authorises contracts for their safe transport to England, and, by section 6, enacts that after the delivery of any such convict to the contractor, “ his transportation to England, safe custody, treatment, and confinement until delivered to the authorities in England shall be regulated to all intents and purposes by the provisions of the fifth George the fourth, cap. 84.”

This Act, although authorising imprisonment, and Act approved of by directing a certain mode of treatment upon the high seas, was not thought to exceed the powers of the sent Ministers. Provincial Legislature, and was sanctioned and approved by Her Majesty's present Ministers.

These several provisions, however, only applying to the case of persons *convicted in Courts of Law* of offences, were not in force as to the State Prisoners who confessed their participation in the treasonable practices of which they were accused, but they afford a sufficient guide in an emergency beyond the scope of ordinary law.

These provisions do not apply to persons confessing their guilt. If the British Parliament could authorise the Sovereign to name any place of transportation beyond the seas *out of the British Dominions*, it would seem not less within the authority of the Provincial Legislature to appoint a place of banishment not within the local limits of their authority, but within Her Majesty's dominions, which had been frequently used as a place of transportation from this Colony, and at which Hulks are now kept for the reception of convicts, and to

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which, as appears by Lord Aberdeen's Circular Despatch of the 2nd March, 1835, relative to transportation from the Colonies, such offenders as may be specially selected by the Home Secretary may still be sent. I need scarcely say that this last Despatch was by no means restrictive of my power in respect to the State Prisoners, as to whom Your Lordship's instructions expressly suggest the substitution of transportation and banishment in lieu of capital punishment.

Transportation suggested by Lord Glen-
elg in lieu of Capital Punishment.

The power of the Colonial Governments to punish by transportation is indisputable; and its frequent exercise is recognised by the recital in Section 17, of the Imperial Statute, 5th Geo. 4, cap. 84, already cited; for if by the law of the Colonies convicts can be subject to transportation beyond seas, the Legislatures of such Colonies must have power to pass such laws.

I, as Governor-General and Governor-in-Chief of Canada, had a power to appoint the place to which any person should be transported who was convicted of a transportable offence, or who being capitally convicted should assent to such commutation of his punishment; and I had at my disposal the immediate means of transport to any place within the command of the Admiral on the Halifax station, and the previous assent of the Admiral to give every facility within his power.

Earl Durham as Governor-in-Chief possessed this power.

The Legislature which had the power to suspend the Habeas Corpus Act, and to place the whole country under the operation of Martial Law, to substitute a Drum Head Court Martial of Volunteers for a trial by Jury in the ordinary Courts of Justice in the country, if they had thought it necessary to exercise it, (and their guilt, which could suspend the Habeas Corpus Act, and substitute a Martial Law, had an equal right to punish offenders admitting the Executive Government alone did in fact exercise it,) had an equal power (it would be contending for little to say an equally Constitutional right) to subject to punishment those who admitted that they had offended against the laws of their country, and who prayed to be spared a public trial, to which the public interest was alike opposed. The Legislature had an equal power by law to pass an Act of attainder with or without forfeiture of property, and with or without examining further witnesses, as they might think most likely to conduce to the benefit of the public and the tranquillity of the Province, against the associates of those who pleaded guilty, and who had fled from the pursuit of justice to a foreign country.

The power of the former Legislature vested in Earl Durham by Imperial Statute 1st Vict. c. 9.

The Legislature did not exceed its authority.

The Legislature of Lower Canada had a legal right to transport the offenders to Bermuda.

When they arrived there, the power of the Legislature ceased, and it was the business of Her Majesty's Government to retain them there.

It was foreseen that the prisoners might be released by the Governor of the Bermudas, and declined to allow the prisoners to be landed, or, if landed, might have instantly released them, or,

Whatever power was invested in the assembled Legislature of this Province before the recent troubles, was vested in me and the Special Council by the Imperial Statute of the first Vict. chap. 9, so far as that Act did not expressly circumscribe the power which it originated. I have yet to learn that the Ordinance of the second Victoria, cap. 1, (now disallowed,) in imposing the penalty of transportation to Bermuda on the State offenders, violated any one of the restrictive clauses of the Imperial Act. With the question in a Constitutional point of view, it is not my purpose in this place to deal, my arguments are directed merely to the legality of the Ordinance, to shew that, (whether inoperative or not in any respect) it is not illegal, — to shew that the Legislature of Lower Canada, as constituted by the Imperial Parliament, kept within the limits of its authority.

I contend, then, with every deference for those who may have expressed a contrary opinion, that the Legislature of Lower Canada had a legal right to transport any offenders to Bermuda, and under that authority to convey them there *if they had "the means,"* as much as to send them to England and provide "the means," and there to leave such offenders, liable to such restraints as it might please Her Majesty to subject them to. But Her Majesty could only act through the constituted authorities. The constituted authority here was the Governor, who under sanction of the Legislature of Lower Canada conveyed them, by the means at his disposal, to the Bermudas. There the power of the Legislature of Lower Canada and of the Governor General ceased. When the Prisoners arrived at the Bermudas, it was the business of Her Majesty's Government either through the Imperial Parliament or through the Local Legislature to retain them there. It was perfectly well understood here in the passing of the Ordinance, that there was no power in this Legislature to pass any Laws which could be binding in the Bermudas; and the Ordinance was confined to its recited object,—"to provide for the present security of this Province by effectually preventing the several persons" named in it "from being at large therein."

It was foreseen that the Governor of the Bermudas might have refused his assistance in this emergency

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if not, that before Her Majesty could procure any laws to be passed subjecting the parties to the necessary restraints to prevent their return, the parties might apply to the Courts of the Bermudas for their writs of Habeas Corpus, and might be enlarged and quit the Island to return. Opposition to an Ordinance intended as, and being in fact, an extension of Her Majesty's mercy towards the individuals who were the objects of it; would probably have weakened the claim to a future permission to return to the Province, a permission which, if the British Parliament had adopted and continued the Ordinance, would have become of the utmost importance to the persons transported; but the "present security" of the Province was further guarded by a severe penalty (not, as is evident from the Ordinance, to be inflicted without trial) upon such as should return without due permission. As the Ordinance stands, coupled with the First

Victoria, chap. 9, it simply imposes banishment for four years from the Province under the penalty of death. The returning from transportation before the period for which it is inflicted, is subjected to capital punishment by many provincial statutes, in cases where the original offence is not to be punishable. To have imposed a lesser penalty would have been to lessen the original offence of Treason, which those transported had committed.

In conclusion, I maintain that in no respect is the Ordinance illegal, although in part it might have been inoperative without the co-operation of Her Majesty's Ministers and the British Legislature. Instead of waiting for the express direction of the Government I determined for the sake of tranquillizing the Province to anticipate such co-operation and to remove the Prisoners instantly.

I have, &c.

(Signed.)

DURHAM.

To the Right Honourable

THE LORD GLENELG.

&c. &c. &c.

(Copy) No. 68.

Castle of St. Lewis,
Quebec, Sept. 28th, 1838.

MY LORD,

I had the honor to receive, on the evening of the day before yesterday, your Lordship's Despatch of

Despatch of Earl
Durham to Lord
Glenelg.

D

August 18th (No. 89) with its inclosures. That communication was accompanied by private letters and by full Reports of the recent proceedings in both Houses of Parliament, with respect to my mission.

Earl of Durham pro-
ceeds to give the
reasons of his deter-
mination to resign.

The information thus supplied enables me to fulfil the promise made in my Despatch of the 25th instant, (No. 66) of fully explaining to your Lordship the grounds on which I had determined to resign my Commissions of High Commissioner and Governor General of Her Majesty's Colonies in North America.

The Act of mere indemnity which has passed the British Legislature, no doubt differs, very materially, as your Lordship observes, from the Bill introduced by Lord Brougham. The Bill would have placed such restrictions on my authority as to deprive me of the legal power indispensable to the temporary government of this distracted country; the act only purports to save me harmless from the consequences of a measure declared to have been illegal. Still my position has been, morally and practically, so much weakened as to be no longer tenable with a hope of beneficial results. But I will not detain your Lordship by drawing any further comparison between the Bill that was proposed and the Act that has passed. The latter measure is now irrevocable and must be considered on its own merits. It is only in that point of view, which however does not exclude any of the Parliamentary proceedings, which resulted in the passing of the Act, that I request your Lordship's attention to the following observations on the subject.

The concession made by Her Majesty's Ministers weakened his authority more than any proceedings that could have taken place in the House of Lords.

Your Lordship informs me that "Her Majesty's Government felt it their duty to offer a decided opposition" to the second reading of the Bill introduced by Lord Brougham. But in what, I venture to ask, did that opposition result? In a concession far more calculated, as it appears to me, to weaken my hands, than would have been any vote of the House of Lords, in which it is notorious that Her Majesty's Government have never commanded a majority. A vote of the House of Lords adverse to Her Majesty's Government, or merely condemnatory of any proceeding of mine, would have been considered almost as a matter of course in the present state of parties; and would, if it had been decidedly opposed by the Ministers, have left my authority untouched, because it would have been attributed to the mere party motives of a powerful opposition. Supposing that such a vote had been

passed, there would have remained the House of Commons, where I am bound to presume that a measure, decidedly opposed by Her Majesty's Ministers, would not have been adopted. In that case, the Parliamentary proceedings on this subject would but have resembled many others which have occurred of late years, and which have left the Government unharmed by a hostile proceeding of the House of Lords. In that case, I should have suffered no greater inconvenience than such as any Government must be subject to, which is vigorously and almost constantly opposed by a majority in the Upper House. As respects these Colonies, I do believe that the inconvenience would not have been very great; because the adverse proceeding would have been attributed altogether to the state of parties in England, and would have been considered as foreign to the state of affairs in this part of the world. But at all events, in that case, my acts and my authority would have been supported by the House of Commons and the Crown. How different

is my actual position! In order to stop hostile proceedings in the House of Lords,—(for after Your tile proceedings in the House of Lords, Ministers advised the Lordship's Despatches approving of all my measures, I can discover no other motive for the step),—Her Majesty's Ministers determine on advising the Crown to render abortive the most important act of His Government. The Crown, therefore, whose Representative I am, condemns me on the ground that I have acted illegally. In order to stop hostile proceedings in the House of Lords,—(for after Your tile proceedings in the House of Lords, Ministers advised the Lordship's Despatches approving of all my measures, I can discover no other motive for the step),—Her Majesty's Ministers determine on advising the Crown to render abortive the most important act of His Government.

Further reasons for his Lordship's dissatisfaction.

tative I am, condemns me on the ground that I have acted illegally. But this is not all. The manner of the condemnation requires (at least so it is supposed by those who advise it) that I should be saved harmless from the consequences of the measure which, whatever it may have been before, they render null and void. They imagine that I require such a shield. They think that, without it, the prisoners now in Bermuda, whom I refused to subject to the jurisdiction of such a Tribunal as would assuredly have condemned them to death, whose property as well as lives I spared —whom I saved from the ignominy of transportation as convicts;—whose parole of honor I took as sufficient security for their not attempting to escape;—that these men are to sue me for damages for such treatment. This is the opinion of Her Majesty's Ministers, and therefore, having disallowed the Ordinance, they support in both Houses the Bill of Indemnity.—The condemnation of the most important measure of my Government has thus become the Act of the whole

British Legislature. In addition to all this, the Act requires that it should be proclaimed here; and I am thus compelled, unless I should instantly resign, to join in the condemnation that has been passed on me by the Crown, the Lords, and the Commons.—I may surely be permitted to think that adverse votes of the House of Lords would have been infinitely preferable to the course which has been taken in order to avert that evil.

Being determined above all things that no personal feeling or consideration shall have any influence on my conduct in the present state of public affairs in this Colony, I shall proclaim the Act of Indemnity in the next official Gazette. If I resigned immediately that duty would be imposed on the Administrator of the Government. The reasons which induce me to abstain from resigning at present will be stated hereafter. Meanwhile I have to explain the grounds on which it appears to me that my permanent occupation of this Government would be rather injurious than beneficial to Her Majesty's service.

In my anxious examination of this question, I have endeavoured to disregard the past, excepting as it affects the future. By this course I have hoped to gain two advantages, first, that of simplifying the subject, and secondly,—which is far more important,—that of preventing the intrusion of wounded personal feelings into a deliberation, which should be conducted solely with a view to public objects.

Recurring to the past then, only as it bears on the future, I am desirous to point out, what seems to have been overlooked by every body in England, that the particular measure, which has been condemned, forms but a part, though a very important one, of the whole policy of the Special Council and the Proclamation of Amnesty issued on the day of Her Majesty's Coronation. That policy was not indicated by either of those measures separately. The two measures were indeed one, having been divided into two parts merely for the purpose of imposing on the Governor and Council all that required legislation and was of a penal character, and making all that partook of mercy and kindness the Act of the Queen. Nor was the whole policy proclaimed on that day, to be found in the Ordinance and Proclamation alone. The official Gazette in which those documents were published, contained a most unusual announcement in the following terms:

Act of Indemnity to be proclaimed in the next Gazette.

Policy of the Governor and Special Council explained.

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"We are authorised to state that His Excellency the Governor-General is actively engaged in the preparation of measures, which will, as soon as it may be possible, be embodied in Ordinances of the Governor and Special Council, relative to a Jury Law, a Bankrupt Law, the Judicial and Municipal Institutions of the whole Province, General Education, the establishment of Registry Offices, and the equitable commutation of Feudal Tenures." If it had been possible to prepare measures of this kind in time, they would have appeared in the form of Ordinances on the same day as the Proclamation of Amnesty. But the promise was considered sufficient to indicate my sense of the necessity of very important changes in the Civil and Municipal Law of the Province. The whole policy which I intended to pursue, was embodied in that promise, in the Amnesty, and in that part of the preamble of the Proclamation, whereby is asserted Her Majesty's firm resolve to punish with the utmost severity any *future* act of insubordination, and more especially to prevent in future the occurrence of dissensions similar to those by which the Province has been disturbed, by effectually removing all *causes* of dissension, so that the Province might be established in peace as a loyal and truly *British Colony*." I had made up my mind, it was evident, to the necessity of rendering the Institutions of this Province thoroughly British. But it was also plain, I hope, that admitting as to the future, the necessity of measures which would be unpalatable to the majority of French Canadians, I was desirous to deal very leniently with such of them as had by their conduct become amenable to severe punishment. As to the past, I proclaimed forgiveness and oblivion, as to the future, British Institutions; as to the present, security against the disaffected. The only provision for the security of the Colony, has been rendered null. Moreover, since the different parts of the whole scheme of policy were intimately blended with, and dependant on each other, the destruction of one portion of it affects all the rest, not merely by giving a triumph to the disaffected generally, and allowing the worst of them an opportunity to play over again their part as leaders in a Rebellion, but also (and this is the main consideration) by shewing that no reliance is to be placed upon the validity of any law, or the performance of any engagements proceeding from the extraordinary authority which has been created for the

This policy thwarted
by rendering null the
only provision for the
security of the Colony.

temporary Government of this country. If I have described my own policy aright, I shall not err in representing that of the Imperial Government as one productive of insecurity at present, and of doubt, uncertainty and want of confidence, as to the future.

If any defect existed
In the Ordinance it
was not occasioned
by any oversight.

The particular defect of the Ordinance which has led to the disallowance of the whole of it, was occasioned by no oversight of the extraordinary Legislature of Lower Canada. I believed, and still believe, for the reasons assigned by me in my Despatch No. 67, that by the Legislative powers entrusted to that body, we were authorised to banish persons from the Province, and that according to a constant course of precedents furnished by the Legislation of the Province, our power extended to the custody and disposal of Provincial Prisoners while on the High Seas, and to landing them on the shore of Bermuda, or any other portion of the globe in which free access to strangers is allowed by the municipal laws. Further, it was well known to us, our jurisdiction did not extend; once landed in Bermuda, the Prisoners were subject only to the laws of that Island. It was known that they would not arrive there as convicts, (especial pains had been taken to spare them that indignity) and that the laws therefore which held good with regard to ordinary convicts, would not apply to them. It was known that they could be forcibly detained within the precincts of Bermuda only by provisions to be made for that purpose by the Legislature of the Island, or by the Imperial Parliament. The words of the Ordinance, which authorised Her Majesty to impose restraints on the Prisoners in a Colony not subject to our jurisdiction, could give Her Majesty no power which she did not possess before. It was never supposed that they could; and that part of the Ordinance was passed with a perfect knowledge that it was wholly inoperative, and that the prisoners could not be compelled to remain in Bermuda without the adoption of measures in aid of our Legislation by the authorities of the Island or of the Empire. The words were inserted for the double purpose of showing that the prisoners were not to be subjected to the ordinary treatment of ordinary convicts, and a relieving the loyal inhabitants of the Province from the apprehension of the immediate return of these dangerous persons to its limits or its vicinity.

The object of the Ordinance was secured. As it happened however, the object of the provision in question was attained in spite of its legal inade-

quacy. For the detention of the Prisoners in Bermuda was secured by their voluntary parole.

by the voluntary parole of the prisoners.

Except for the purposes I have mentioned, the words objected to were, in fact, mere surplusage. If, as common sense points out, they were merely inoperative, their insertion is a matter of no importance. If the Lawyers are technically right in confounding two very distinct words and ideas, and describing as illegal all Legislative provisions, which are obviously inoperative, it may be inferred that Her Majesty could not give her sanction to this enactment, and that the disallowance of the Ordinance was a matter of technical necessity. But in either case it was the business

of a wise Government and Legislature to correct the errors or supply the imperfections which had their origin in a zeal for humanity, and for the integrity of the Empire. I speak of a Policy, of which the leading features and animating spirit have now been sanctioned by almost universal assent. It has hardly been

If the Ordinance was inoperative or deficient, it was the part of a wise Government and Legislature to supply what was wanting to render it effective.

impugned even in this Province by those, whose friends I could not entirely relieve from all punishment for rebellion, or those whose sense of Justice I shocked not a little by the supposed inadequacy of my penalties. It has been generally and cordially approved even in its details, by the people of the neighbouring States—the people in the world the most competent to judge without passion of the local necessities of the case, and not the least ardent in their love of freedom and their respect for the law. It has not, even amid the acrimony of party debates at home, been denied by any person whose opinion has any weight with any body, to possess the merits, (all by which I set much store) of substantial Justice, mercy and sound discretion. A Government and Legislature anxious for the tranquillity of this wretched Country, for the interests of humanity, for the honor of the British Crown, would not have lightly foregone the benefits which such a Policy promised and had already in a great measure secured. They would have taken great care that its great and beneficent purpose should not be frustrated by any error which they could rectify, or by the want of any power which they could supply. If they found the Ordinance inoperative, they would have given it effect, if illegal they would have made it law.

Instead of this, Her Majesty's Ministers, at the instance of a branch of the Legislature, have decided on disallowing the whole Ordinance. And in place of

The whole ordinance having been disallowed, the policy adopted by Earl Durham has

been rendered null, finding the compensation which I had a right to expect, and he finds himself compelled to persevere in his determination to resign.

I am favored with an Act of Indemnity, for which I can be thankful only because it purports to relieve others from any penalty incurred by their ready acquiescence in my views. The disallowance of the Ordinance, has, I repeat, rendered null all the repressive portion of my policy ; it has also, by extending a complete pardon to all, deprived me, who do not shrink from the ungracious task of framing measures obnoxious to one class of the people, of the power to make them some compensation by further Acts of gracious kindness. Finally it overthrows all confidence in my engagements ; it deprives my pledged word of all weight and value. I should now legislate if at all, with the expectation that each measure would be scanned and criticised in a hostile spirit, and not improbably rendered abortive by the Supreme authority. A delegated authority when not sustained by the power that has bestowed it loses all moral force ; and I need not remind your Lordship that a Government of mere physical force is neither possible on this continent, nor would be otherwise than wholly inconsistent with my feelings and opinions. Therefore I am satisfied that the proceedings of the Government at Home entirely preclude me from carrying out the Policy, which I had proclaimed and on which I have acted. I could not adopt a new policy now, without bringing ridicule on all concerned. I am thus disabled from rendering any important service to the public in my present situation. By retaining an authority which has become merely nominal as regards the great purposes for which it was created, I should wilfully delude the public with false hopes, and deliberately provide for a more bitter disappointment. These are the main grounds on which I persevere in the determination of resigning, announced to you in my Despatch No. 66.

The reasons given not the only ones which induce His Lordship to resign.

But these, though the principal, are not the only reasons, which induce me to resign. The late proceedings at home have not merely, by destroying the moral power of my Government, deprived me of all the necessary means of carrying into effect a policy, of which the Ordinance in question was a small though essential part, but have by the disallowance of that particular measure, imposed on the Government of this Province the most serious practical difficulties.— I have already called Your Lordship's attention to the fact, that the disallowance of the Ordinance annuls all

the measures I have taken. Her Majesty has not excused an important place in the same speech recently delivered, was not mentioned, and should have done so. Our action was thought done ; and our provincial government to suggest that we were questioning the late mission, and lect in doing it : It is not additional and odious to accomplish with baulked the intention left without.

The reasons given to me by Her Majesty you say views of the Government to adopt of the disallowable to the Ordinance sons will their reasons.

You desire the whole of and wisdom." others,

the measures of precaution and punishment which I have adopted; and that the universal operation of Her Majesty's Proclamation of Amnesty, limited by no exceptions save those now invalidated, establishes an impunity absolutely co-extensive with crime; and places the leaders of the Rebellion precisely in the same situation as that which they occupied before their recent unsuccessful attempt. I find that this result was not wholly overlooked in the debates in Parliament, and that it was suggested that some precautions should be taken by the authority, which invalidated our acts, to avert the mischief thereby occasioned.— Though much was said, however, nothing has been done; the work is left to be performed by the Provincial Legislature, and Your Lordship is kind enough to suggest the course, which you think it advisable that we should adopt in the present emergency. The question of the disposal of the persons implicated in the late insurrection was one originally foreign to my mission, an obstacle left in my path by previous neglect in one quarter or another. I succeeded in removing it: the effects of its existence had been effaced.— It is now placed in my way once more: with this additional disadvantage, that, having all that is difficult and odious to do over again, I had lost the power of accompanying it with an act of grace. I have to punish without pardoning, and justice having been now baulked of its due, I am to execute whatever vengeance the interposition of the Home authorities may have left within my reach.

The suggestion made by Your Lordship appears to me liable not only to this, but to other objections.— The course suggested for His Lordship's future adoption, discussed.

Your Lordship appears in a subsequent passage to desire that such an Ordinance should apply to the whole of the "persons whom in the exercise of a sound and wise discretion, I have excepted from the Amnesty." This would include Mr. Papineau, and the others, whom, being at large and absent from the Pro-

vince, the disallowed Ordinance had sentenced to banishment. But from a paragraph immediately following, which refers to the course practicable under an Ordinance of Sir John Colborne's, I am led to suppose that you look to a suspension of the Habeas Corpus Act as sufficient for effecting the exclusion of those dangerous persons.

If the Ordinance which you propose, were to exclude only the eight persons now in Bermuda, it would be useless and iniquitous. There would be no justice in punishing Mr. Bouchette for being taken, while Mr. Gagnon the companion of his guilty enterprize is allowed to return unmolested to his home: or in dooming Dr. Wolfred Nelson to a severer lot than that assigned to his brother, who was not only guilty of Treason previous to leaving the Province, but has since invaded it at the head of an armed band of foreigners and refugees. If it be politic to allow Mr. Papineau to return and resume his former course, it were surely a heedless and petty cruelty to banish from their homes his bolder and therefore less dangerous tools.

The new Ordinance proposed would be liable to the same objections as the former one. If the Ordinance were to include Mr Papineau and the others who had been banished without a trial or confession of guilt, the ends of substantial justice would be attained in the same way as in the disallowed Ordinance, and the new Ordinance would be liable to the same objections as those urged against the former one. Your Lordship I know does not participate in these objections. But experience has shewn me that it is necessary in the present times for those exercising an arduous responsibility far from home, to look to the opinions not only of the Ministers but also of the opposition. And in following a course similar to that, which has been already impugned by Your Lordship's opponents in Parliament, I do not feel quite sure that the same power which has induced Her Majesty's Government to cancel an act of which you had already declared their approbation, might not compel them to disallow the very course suggested by themselves. The mere substitution of a milder punishment in place of that of death, would obviate none of the objections made on principle to the infliction of any penalty without trial. No one can imagine that Capital punishment would ever have been wantonly inflicted by one, who has deviated from the ordinary Law; in order solely that he might exercise a more than ordi-

nary clemency. That penalty was announced in the Ordinance because it seemed necessary according to the general practice of civilized nations to enforce submission to the second in the scale of penalties by a threat of the highest. To call an act innocent in itself, by the name, and subject it to the penalties of Treason, is not more revolting to strict notions of ordinary Law than to call it Felony or Misdemeanor, and punish it with banishment, imprisonment or fine.

Your Lordship suggest that this new policy should be completed by a suspension of the Habeas Corpus, and such a measure I am aware has been suggested as a matter of course by some speakers in Parliament, who profess most regard for the British Constitution. I cannot bring myself to rate the great guarantee of personal liberty as so unimportant a part of the British Constitution, or of those securities which should be possessed by every civilized community. On the contrary, I am inclined to think it quite as important, and quite as sacred from heedless and unnecessary violation as any without exceptions of the provisions made for fair and open trial. And I must own that I have seen with no little regret how much men's minds appear to have been familiarized with the idea of suspending the Habeas Corpus by the frequency, with which it has been done in the bad periods of our own history; and the consequent facility with which in these debates it seems to have been proposed as a mere matter of course, by some of those, who express the greatest horror at any deviation from what they call a Constitutional course. To me, my Lord, it appears that men's notions of right and freedom would be much more shocked at such an universal violation of every man's dearest right, than by any summary process adopted for the punishment of the undeniable guilt of a few. I do not say that there are no circumstances under which I would consent to a suspension of the Habeas Corpus. I should not hesitate to adopt it in any emergency in which the notoriety of a general outbreak or of a general purpose of insurrection might render it advisable that a Government should be for a while armed with a power of arresting the objects of its suspicion without bringing them to immediate trial. But I see no necessity on account of any existing evil in this Province for taking such a step now: and the present Legislative authority of this Province will be capable of being brought into im-

Habeas Corpus—the property of the sus-
pension thereof con-
sidered.

mediate action at the moment in which any danger may declare itself, on no other ground can I consent to propose such a measure for adoption by the Special Council. I cannot think it justifiable to take away the franchises of a whole people in order to punish a few known and dangerous individuals, or to guard against the misconduct of twenty-three men by enveloping them in a general forfeiture of personal liberty.

Had the suggestion been accompanied by positive instructions, immediate resignation would have been the consequence.

Had Your Lordship's suggestion of these measures been accompanied by positive instructions for their instant adoption, I should have felt that, in consequence of my insuperable repugnance to taking any part in them, it would be my duty to resign immediately the Government of this Province, and to give up my authority to a successor, who would carry your orders into effect; but as you expressly state, that you "do not intend to prescribe to me, the precise course, to which you have adverted, as that, which under existing circumstances ought to be adopted," I conclude that you mean not in any way to fetter my discretion. I shall therefore pursue the course, which, taking all the circumstances of the case into consideration, I regard as best calculated for the public service.

Reasons why His Lordship's resignation is not immediate.

I do not instantly resign my authority, because I have made engagements, and imposed upon myself obligations which it is absolutely necessary that I should fulfil. In my character of Governor-General, I have set on foot the reform of some practical grievances which are among the many that have been long suffered by the people, and which, I fear, they might continue to suffer, if the governing hand, which has first ventured to meddle with abuses in this country, were suddenly withdrawn from the work of reformation. In some cases, both of individuals and classes I have held out hopes, and made virtual promises, to which every sense of honor and of truth commands me, as far as remains in my power, to give effect. In my character of High Commissioner, I have instituted enquiries, some of them relating to the whole of these Colonies, and all to subjects of great importance, considering the great expense necessarily incurred in carrying out the objects of my mission, and the lamentable want of information upon these subjects, which prevails in the Imperial Legislature, I should take shame to myself, if, except under some absolute necessity, I were to leave these enquiries incomplete.— Above all I am desirous that my mission should not

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prove fruitless as to its main object, namely, the preparation of a plan for the future Government of this part of the British Empire. Such a plan could only be framed upon ample information as to the wants, dispositions, and interests, as well conflicting as general, of every class of Her Majesty's subjects in these Colonies. I have endeavoured to gain such information from all quarters, but have not yet completed that very arduous task; still it is so near completion, that I cannot bear to think of leaving it unfinished; and, if unfinished, productive of no other result than a waste of public money, of the laborious exertions of those whom I have employed, and of the patience of the people of these Colonies, which I do solemnly assure

His Lordship's future intentions.

Your Lordship may be tried overmuch. I have no doubt that, in a few weeks more, nothing essential to this object will be left undone. I shall then return to England without loss of time, for the purpose of laying at the feet of the Queen the Commissions of Governor-General and High Commissioner with which Her Majesty has been graciously pleased to honor me. And then, in my place in Parliament at least, I may be able to render my mission productive of good, by satisfying the British people and Legislature, of the absolute necessity of steadily pursuing towards these Colonies a very different policy from any that has yet been adopted by the Parent State.

Even if I can do no other good there, I shall be His Lordship's experience of the Colony will be of some use, the too prevailing disposition of Parliament to decide on the vital interests of this distant community according to the principles of a Constitution, and the feelings of a state of society, the least analogous to those which prevail here. The Government of these Provinces requires something more than a knowledge of the Common and Statute Laws of England. Though the object of wise and benevolent statesmen should be to establish the great principles of the British Constitution, and the English Law in the Province, it must not be supposed that this is yet done, and I trust that the acts of future Governors will be submitted to the decision of some more competent Judges than those who profess to try such acts by the mere principles of English Law.

My acts have been despotic, because my delegated authority was despotic. Until I learn from some one better versed in the English language that despotism

means any thing but such an aggregation of the supreme Executive and Legislative authority in a single hand, as was deliberately made by Parliament in the Act, which constituted my present powers, I shall not blush to hear that I have exercised a despotism. I shall feel anxious only to know how well and how wisely my countrymen think that I have used, or rather exhibited an intention of using my great powers.

Nor shall I regret that I have wielded these despotic powers in a manner which, as an Englishman, I am anxious to declare utterly inconsistent with the British Constitution, until I learn what are the Constitutional principles that remain in force when a whole Constitution is suspended, what principles of the British Constitution hold good in a country in which the people's money is taken without the people's consent, in which representative Government is annihilated; in which Martial Law has been the law of the land; and in which the Trial by Jury exists only to defeat the ends of justice, and to provoke the righteous scorn and indignation of the community. I should indeed regret the want of applicability in my own principles of Government, or my own incapacity for applying them, had the precise course, which I should think it imperative on me to pursue in a land of freedom and of law, proved to be the only one which I could adopt in a country, which long misgovernment, and sad dissensions have brought to a condition which may fairly be described as one of constituted Anarchy.

I have, &c.

(Signed,) DURHAM.

The Right Honorable

THE LORD GLENELG.

&c. &c. &c.

—•—
CIRCULAR.

Downing Street.
1st December, 1838.

Circular Letter respecting the Earl of Durham's Despatches, and his Proclamation of the 9th Nov. **SIR,**

The Earl of Durham having informed me that he has transmitted for your guidance and information copies of his Despatches to me of the 25th, 26th, and 28th September, Nos. 66, 67, and 68, I feel it my duty to enclose herewith, for your information, copies of the answers which I have returned to those Despatches, together with the copy of a Despatch which

I addressed to the Earl of Durham on the 15th instant in reference to his Proclamation of the 9th October last.

I have, &c.

(Signed,) GLENELG.

His Excellency Major General,

SIR GEORGE ARTHUR, K. C. H.

(Copy) No. 126.

Downing Street,

26th October, 1838.

Despatch.

Earl Glenelg in answer to Earl of Durham's Despatches of the 25th and 28th of Sept.

MY LORD,

Since the date of my Despatch of the 19th instant, Her Majesty's Government have had under their consideration your Lordship's Despatches, No. 66, of the 25th of September, and No. 68, of the 28th of September.

Her Majesty's Government observe that the first of these Despatches was written before your Lordship had received any official information of the proceedings which took place in Parliament with regard to the Ordinance of the Special Council of Lower Canada for providing for the security of the Province, or of the course adopted by Her Majesty's Government in reference to those proceedings. That Despatch was written, consequently under the feelings and impressions which could scarcely fail to be excited by the partial information, derived only from the public prints, of what occurred in the earlier stages of the Parliamentary discussions on the subject. Under such circumstances, unacquainted as you were in a great measure with the considerations which had led Her Majesty's Government to the conviction that the course which they reluctantly felt themselves bound to pursue was, in the actual situation of the question with which they were called to deal, the one least likely to prove injurious to the public interests, and to your authority, and representing, as it was natural to do, the imputation of an abuse of arbitrary power, it cannot be matter of surprise that your Lordship should have conceived your position in Canada to be so materially affected as to leave you little hope of a successful result to your mission.

Fully entering into the feelings occasioned by the report of the earlier proceedings, only in the House of Lords, Her Majesty's Government do not think it

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Regret at His Lordship's determination to resign the Government.

necessary, with reference to the first of your Despatches, to do more than express their deep concern, that yielding to the impulse of the moment, you should at once have publicly announced your determination to resign your authority.

Her Majesty's Ministers trust, however, that, in possession of your position no longer tenable with a prospect of beneficial results. But they have been relieved from the subject, it is not His Lordship's intention abruptly to relinquish his authority, without completing some of the measures contemplated as the principal objects of his Lordship's mission.

On the evening of the day subsequent to the date of your first Despatch your Lordship appears to have received my Despatch of the 18th August, together with full reports of the proceedings in both Houses of Parliament with regard to your mission. Her Majesty's Government deeply regret that with this full information before you, your Lordship, at the date of your Despatch of the 28th September, still considered that, in possession of your position no longer tenable with a prospect of beneficial results. But they have been relieved from much of the apprehension which they would otherwise have entertained for the security of the Province and the interests entrusted to your care, by the assurance contained in your last Despatch that it was not your intention abruptly to relinquish your authority, or to abandon the Post which you occupy, without giving effect to the reform of some practical grievances, to the redress of which you had applied yourself, without completing the main inquiries which in your character of High Commissioner you had instituted,—and, above all, without accomplishing the chief object of your mission, in the preparation of a plan for the future Government of the British North American Provinces. Her Majesty's Government fully appreciate the motives which have induced you to postpone your intended resignation until these important ends shall have been attained, and they are persuaded that the same regard to the public interests which had deterred you from a sudden and immediate resignation will prevent you hazarding the tranquillity of the Canadas, or placing their security in jeopardy, by the premature relinquishment of your authority, should any circumstances not contemplated at the date of your Despatch convince you that your departure at the time which you then anticipated would be attended with results dangerous to the peace and safety of the British North American Provinces.

Connected with this important object, the safety of the Provinces, is the question to which your Lordship adverts, of the mode of preventing the evil to be apprehended from the impunity of the authors or leaders of revolt. Your Lordship objects to what is called

the suspension of the Habeas Corpus Act, as a measure involving a whole people in a penalty in order to punish a few; and you likewise condemn the levity with which a measure of this severe and arbitrary nature is spoken of in Parliamentary debates.

There can be no question that an Act giving power of arbitrary detention and imprisonment is one of a serious nature, not to be resorted to without necessity founded on circumstances of public danger. But Her

Majesty's Government cannot agree with Your Lordship that these temporary suspensions of a constitutional Law, do in reality affect the whole people unless upon occasions when the remedy is improperly applied to the existing evil. That remedy when

properly applied, is intended to counteract the designs of a few leaders, and to separate them from the great body of their followers. In this manner it was used

Instances of its use.

after the Revolution of 1688, and after the accession of the House of Hanover; and the stability of these two great settlements was perhaps in a considerable

degree owing to the readiness and decision with which this remedy was applied. In such cases the leaders of Revolt, and the chiefs of conspiracy, know themselves to be struck at, and feel their safety endangered;

but the great body of the people, relying on the general spirit and administration of the Law, fear nothing from its momentary interruption, and enjoy their liberty unmolested. Such, it appears to us, is the case of Lower

Canada, at a moment when rebellion has but recently been suppressed, and preparations for a renewal of it are threatened. At such a moment the loyal and peaceable inhabitants of the Province will be more

secure, while the fomenters of revolt are in danger, and on the other hand, if the fomenters of revolt can act with impunity, the peaceable inhabitants are in danger. Your Lordship asserts in your Despatch

that in the present state of the Province "Trial by Jury exists only to defeat the ends of justice, and to provoke the righteous scorn and indignation of the community." This a picture of a most lamentable state

of things, of which the truth I fear must be admitted, and the evil cannot be overated. On the due execution of justice the whole relations of society depend. If men

find that the murder of their relatives and friends is not visited with retribution in a Court of Justice, it is scarcely to be expected that they will abstain from a

Suspension of Habeas Corpus adverted to.

A measure not be resorted to, except in extreme cases.

When this remedy may be properly applied.

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recurrence to the personal revenge which, in reliance upon Law, they had relinquished.

The present state of things requires a remedy. This state of insecurity imperatively requires a remedy. It is therefore the desire of Her Majesty's Government that an Ordinance should be passed by the Special Council of Lower Canada, constituting a Tribunal for the trial of Treason and Murder.

Remedy proposed.

With respect to the manner in which such a Tribunal can be formed, it is not proposed to bind your Lordship's discretion. Learned Judges alone might constitute a sufficient Court for the trial of these offences; or it might be better to form Courts more nearly resembling Courts Martial,—or to combine both these species of Tribunal. But in any case where trial by Jury has excited the righteous scorn and indignation of the community, it cannot be difficult to form tribunals more impartial and more competent than the existing Juries. The cautious habits of learned Lawyers and the fairness usually exhibited by Englishmen even to enemies taken in open resistance, added to the publicity of their proceedings, would be a security that none but the most conclusive evidence would lead to convictions.

Such tribunals should be formed without delay, so that offenders might not complain that they were tried by an *Ex post facto* Law.

It would not be safe to postpone the formation of such tribunals until a new Insurrection may happen to break out, for the same objections which induced Her Majesty's Government to reject the proposition to subject the prisoners charged with being concerned in the late revolt, to new tribunals constituted after the commission of the offences, would again apply. Men would complain that they were tried by an *ex-post-facto* Law. While therefore the power of detention and imprisonment without trial may well be reserved for a period of emergency of which your Lordship will be the judge, it is the desire of Her Majesty's Government that you should at once prepare and propose to the Special Council an Ordinance for constituting Tribunals by which future rebels and murderers may be tried. The leaders and Agents of Insurrection will thus be forewarned, and cannot justly complain if they are made amenable for their crimes.

Lord Glenelg abstains from a detail of matter of minor import, which you have addressed to me on the course pursued by Her Majesty's Government, with regard to the general soundness of the Earl of Durham's policy, and in my Despatch of the 18th August, of the undimin-

ished confidence of Her Majesty's Government in your Lordship, and of their cordial approval of the spirit and tenor of your administration, I can only add that subsequent experience has tended to justify and confirm their persuasion of the general wisdom and soundness of the policy by which you have been guided.— They continue to feel that, under the difficult and peculiar circumstances forced on them by the proceedings taken in the House of Lords, they adopted that course which was calculated to render those proceedings as little injurious as possible to the public interests, and to the great objects of your mission. They could not indeed hope altogether to neutralize the evil consequences of what appeared to them an ill-timed and injudicious interference with the exercise of those powers with which Parliament had invested the Governor of Canada: but when they review the unequivocal proofs of respect and esteem which have been largely tendered to you in the North American Provinces, when they consider the repeated testimony of persons having a deep interest in the welfare and security of those Provinces to the beneficial tendency of your administration, and when they observe the unusual concurrence of men of various parties and political opinions in deprecating your intended departure, Her Majesty's Government cannot but think that on the first receipt of the intelligence of the Parliamentary proceedings to which reference has been made, you overrated the effect of those proceedings on the public mind, both in this country and in North America, and formed an incorrect estimate of the state of public opinion with regard to them.

Her Majesty's Government are persuaded that the The main acts of His Lordship's Administration approved of. more closely the main acts of your administration are reviewed in all their bearings, the more apparent will it be to impartial observers, and to men actuated by a sincere regard to national interests, that those acts have been conceived in a spirit and executed with a firmness alike worthy of your reputation and adapted to the exigency of the circumstances with which you were called to struggle. Impressed with these sentiments, and in the absence of any precise information as to the time which may be occupied in the completion of the several objects contemplated in your Despatch of the 28th of September, Her Majesty's Government will abstain, until they hear further from Her Majesty's Ministers abstain from advising Her Majesty Your Lordship, from tendering any advice to Her

as to the succession Majesty as to the succession to your Government.— to the Government. They have received with much satisfaction Sir John Colborne's acquiescence in their request that he would

In the event of His lordship's resignation continue during the approaching winter in the command of Her Majesty's Troops in Canada; and as in affairs will, of course, the event of Your Lordship's return to England, the Colborne, until the administration of the affairs of Lower Canada, will, in appointment of a successor to His Lordship. the ordinary course devolve on that Officer; Her Majesty's Government can feel no difficulty in confiding to his hands the security of the Province until the appointment of a successor in the Office of Governor General.

I have, &c.

(Signed,) GLENELG.

*The Right Honourable
THE EARL OF DURHAM,
G. C. B.*

(Copy) No. 133.

*Downing Street,
12th November, 1838.*

MY LORD,

In my Despatch of the 26th ultimo, I abstained Despatch from the Secretary for the Colonies to Earl Durham, from any notice of your Lordship's Despatch, No. 67, of the 28th September, and of the observations contained in your Despatch No. 68, of the same date, on the proceeding which, in your opinion, ought to have been taken by Her Majesty's Government with regard to the Ordinance of the Special Council of Lower Canada, therein referred to; having thought it desirable to reserve for a separate communication my remarks on those subjects.

Her Majesty's Government have attentively considered the statements which you have addressed to me of your views as to the legality of that Ordinance. Without intending to enter on a legal discussion, or to offer any further opinion, than that which, on the authority of the Law Officers of the Crown, I have already conveyed to you on this subject, I have to express my satisfaction that little difference of opinion exists between your Lordship and ourselves as to the extent to which any valid legal objection could be urged against the Ordinance. Waving the question of your right to send to Bermuda persons under restraint by virtue, not of an Order or Sentence of Transportation, but of an Ordinance of the Special Council

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that particular place, it is admitted on all hands that ^{admitted to be partly} so far as it purported to confer on Her Majesty the power of imposing restraint on the parties named in it, while in Bermuda, the Ordinance was at least ^{inoperative.}

Your Lordship has now informed me that you were always fully aware of this defect; and that "that part of the Ordinance was passed with a perfect knowledge that it was wholly inoperative, and that the prisoners could not be compelled to remain in Bermuda without the adoption of measures in aid of your Legislation by the authorities of the Island, or of the Empire. Your Lordship has further stated it to have been the business of Her Majesty's Government on the arrival of the prisoners at the Bermudas, either through the Imperial Parliament, or through the local Legislature, to retain them there." Her Majesty's Government regret that, until the receipt of ^{Her Majesty's Gov-}ernment not aware ^{that such was Lord} Durham's opinion. ^{your recent Despatches, they had no reason to believe} that such was your view or opinion at the time when the Ordinance was passed.

Neither in your Despatch transmitting the Ordinance to this country, nor in your Despatch to the Governor of Bermuda informing him of your having sent the prisoners to that place, was any allusion made to your expectation of the adoption of any such measures. As the prisoners were sent to Bermuda within a few days after the passing of the Ordinance, and consequently long before it could possibly reach this country, the intervention of the Legislature of the Bermudas on which you now appear to have relied, could not have been made available at the suggestion of Her Majesty's Government, for the purpose of authorising their restraint on their arrival there. That object could only have been attained by a suggestion from yourself to the Governor of Bermuda, of the expediency of recommending to the Local Legislature an enactment of the required character, in case that Legislature should have been at the time in Session, and the Governor should have thought that such a recommendation would be favorably received.

The propriety of proposing a measure to the Imperial Parliament to supply the defect in the Ordinance, did not escape the attention of Her Majesty's Government. It was fully considered by them.— Your Lordship will not expect me to state in a Despatch the reasons which induced Her Majesty's Gov-

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ernment, after full deliberation, to think such a course inexpedient. That I abstained from adverting to it in my Despatch to Your Lordship of the 18th August, was solely owing to the absence of any reference in your previous Despatches to the expectation which it appears Your Lordship entertained that such a course would have been adopted.

Appointment of Mr. Turton to the Executive Council referred to.

There is one other topic to which I hoped it would have been unnecessary for me to recur, but which, after the renewed allusion to it in Your Lordship's

Despatch, No. 66, I cannot altogether pass over in silence, I mean the appointment of Mr. Turton as an Executive Councillor. I abstained from replying to your Despatch of 30th July, No. 30, on this subject, from a conviction that the correspondence which had already taken place with regard to it could not be continued, without a wide departure from the ordinary rules of official communications, and without exposing to needless pain the individual who had unfortunately been the occasion of it. The observations, however, which you have made in your Despatch of the 25th September, compel me to remind you that your selection of that Gentleman for the Office of your legal adviser, was made by you without any previous communication to Lord Melbourne or to myself, and without any knowledge on our part of your intention; and that as soon as it was known to us, Lord Melbourne

**His appointments dis-
approved of.**

stated to you the decided objection which he entertained to the appointment. In consequence of this intimation from Lord Melbourne, you waived the appointment, expressing at the same time your intention, in consideration of the painful position in which Mr. Turton would otherwise be placed, that he should proceed to Canada as your private friend.

It was unquestionably the firm impression, and expectation of Lord Melbourne and myself, that whatever assistance Mr. Turton might render to Your Lordship, would be given in a private capacity; and that he was not to fill any official situation connected with your mission.

I have, &c.

(Signed.)

GLENELG.

*To the Right Honorable
THE EARL OF DURHAM,
&c. &c. &c.*

(Copy) No. 134.

Downing Street,
15th November, 1838.

MY LORD,

I have had the honor to receive your Lordship's Despatch. Despatch of the 9th of October, No. 80, enclosing Earl Glenelg to Earl copies of two Proclamations bearing date respectively of Durham, the 8th and 9th of that month, and published by you in the Quebec Gazette.

Of the Proclamation of the 8th of October, I am commanded to convey to you Her Majesty's approval. Proclamation of 8th Nov. approved of.

The Proclamation of the 9th of October, Her Majesty's confidential advisers regard, not merely as a deviation from the course which has hitherto been invariably pursued by the Governors of the British possessions abroad, but as a dangerous departure from the practice and principles of the constitution. They consider as open to most serious objection, an appeal by such an officer to the public at large from measures adopted by the Sovereign with the advice and consent of Parliament.

The terms in which that appeal has in this instance been made, appear to Her Majesty's Ministers calculated to impair the reverence due to the Royal authority in the Colony, to derogate from the character of the Imperial Legislature, to excite amongst the disaffected hopes of impunity, and to enhance the difficulties with which Your Lordship's successor will have to contend.

The ministers of the Crown having humbly submitted this opinion to the Queen, it is my duty to inform you that I have received Her Majesty's commands to signify to Your Lordship, Her Majesty's disapprobation of your Proclamation of the 9th of October. Her Majesty's disapprobation conveyed to the Earl of Durham.

Under these circumstances Her Majesty's Government are compelled to admit that your continuance in the Government of British North America could be approved. Earl of Durham's intention of resigning.

I presume that before your receipt of this Despatch, your Lordship will have delivered over the Government of Lower Canada to Sir John Colborne, to whom I shall address the requisite Instructions for his guidance.

I have, &c.
(Signed) GLENELG.

THE EARL OF DURHAM,
G. C. B.